

No. 15605

United States
COURT OF APPEALS
for the Ninth Circuit

GEORGE L. SCHARPF AND WILLIAM FRED
SCHARPF, EXECUTORS OF THE ESTATE
OF LOUIS C. SCHARPF,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE APPELLEE

*On Appeal from the Judgment of the United States
District Court for the District of Oregon*

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OPINION BELOW

The findings of fact and conclusions of law (R. 14-21) and opinion of the District Court (R. 47-54) are not officially reported.

JURISDICTION

This appeal involves federal income taxes for the calendar year 1944. (R. 14.) The tax was paid as reported

on the return in 1945 and the additional assessment was paid on March 8, 1948. (R. 15-16.) Claims for refund were filed on March 13, 1948, and February 16, 1951. (R. 17-18.) These were rejected by the Commissioner on October 19, 1954. (R. 20.) Within the time provided in Section 3772(a)(2), Internal Revenue Code of 1939, this action was brought in the District Court on September 19, 1955, for recovery of a portion of the 1944 tax alleged to have been erroneously assessed and collected. (R. 14-15, 40.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346(a)(1). The judgment of the District Court was entered on April 4, 1957. (R. 22.) On May 31, 1957, a notice of appeal was filed. (R. 23.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

Whether the District Court correctly held that the second claim for refund filed on February 16, 1951, was not timely under Sections 322(b) and 3772(a), Internal Revenue Code of 1939, and was not a permissible amendment to the original claim filed on March 13, 1948, which did not set forth the ground upon which this suit is based.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and Regulations may be found in the Appendix, *infra*.

STATEMENT

The facts as found by the District Court may be summarized as follows (R. 14-20):

This appeal involves federal income taxes for the year 1944 assessed against and collected from Louis C. Scharpf (hereinafter designated taxpayer). (R. 14.)

During the year 1944, taxpayer and his wife Eva M. Scharpf resided in the City of Eugene, County of Lane, State of Oregon. Taxpayer died on May 10, 1952, and George L. Scharpf and William Fred Scharpf, appellants herein, were duly appointed by the Circuit Court of Lane County as the executors of his estate, and they are still acting in that capacity. (R. 15.)

On or about January 25, 1941, taxpayer and his wife and John J. Rogers and his wife, Corabelle M. Rogers, entered into a written partnership agreement effective January 1, 1941, for the purpose of conducting under the name of Twin Oaks Builders Supply Company, a general building supply business in the City of Eugene, Oregon. During the year 1944, the business of Twin Oaks Builders Supply Company was carried on in accordance with the terms of the partnership agreement. Taxpayer and his wife duly reported their respective incomes therefrom and paid their individual income tax thereon to the Collector of Internal Revenue for the District of Oregon.

The Commissioner notified taxpayer on October 3, 1947, of an income tax deficiency asserted against him for the year 1944 in the amount of \$8,328.06, based upon

the assertion that one half of the income from Twin Oaks Builders Supply Company, during the year 1944, was taxable to him and none to his wife. On the same date, the Commissioner notified Twin Oaks Company, a corporation owned and controlled by the partners of Twin Oaks Builders Supply Company (hereinafter designated the corporation), of deficiencies asserted against it for the years 1942, 1943 and 1944. The Commissioner's determination was based upon the assertion that all of the partnership income of Twin Oaks Builders Supply Company (hereinafter designated the partnership) for each of the years in question was taxable to the corporation rather than to the partners. On December 24, 1947, the corporation filed a petition in the Tax Court of the United States seeking a redetermination of the deficiencies asserted against it. The controversy was put in issue by appropriate pleadings of the Commissioner and the trial took place on June 7 and June 8, 1948. (R. 15-16.)

Taxpayer paid to the Collector of Internal Revenue for the District of Oregon, on or about March 8, 1948, pursuant to notice and demand dated February 26, 1948, the sum of \$9,792.31, representing the asserted deficiency of \$8,328.06, plus interest in the amount of \$1,464.25. The payment of \$9,792.31 was effected by a cash payment of \$3,403.97 and the application of the total credit from overassessments determined for Eva M. Scharpf in the amount of \$6,388.34. The payment was accompanied by letter dated March 6, 1948, which stated in part (R. 16-17):

The payment of the deficiency above described and the application of the credit as above set out

are not to be construed as an admission of the correctness of the determinations of the Commissioner of Internal Revenue, nor a waiver of taxpayers' right to a refund of any or all of the deficiency concerned in the event it is later determined that the Federal income tax liabilities of the parties are subject to revision.

On March 13, 1948, taxpayer filed with the Collector of Internal Revenue for the District of Oregon a proper and timely claim for refund of the sum of \$7,131.44. The reason set forth by him for the allowance of the claim was that (R. 17-18):

In a proceeding now pending before the Tax Court of the United States, Docket No. 16845, the Commissioner of Internal Revenue has taken the position that all or a substantial portion of the income of this taxpayer for the year 1944, was the income of a corporation known as Twin Oaks Company. Should the Commissioner prevail in such pending litigation, this taxpayer will be entitled to a refund of all or a substantial part of the tax paid by him individually as above described. This claim is filed for the purpose of staying the running of the Statute of Limitations as to the year 1944, and it is requested that any action thereon be delayed until the decision of The Tax Court of the United States shall have been rendered and a final determination had as to the taxation of the income of this taxpayer.

The decision of the Tax Court of the United States in the case of *Twin Oaks Co. v. Commissioner*, referred to in the claim for refund, was filed on July 18, 1949, in favor of the Commissioner. The corporation appealed the decision and under date of July 20, 1950, the United States Court of Appeals for the Ninth Circuit issued

its opinion in the case (*Twin Oaks Co. v. Commissioner*, 183 F. 2d 385) reversing the decision of the Tax Court, finding that the Tax Court erred in sustaining the Commissioner's deficiency assessments against the corporation. (R. 18.)

On February 16, 1951, taxpayer filed a claim for refund in the amount of \$4,138.70 for the year 1944, which purported to be an amendment of the refund claim filed on March 13, 1948. The statement attached to the refund claim was as follows (R. 18-19):

On or about January 25, 1941, I and my wife and John J. Rogers and his wife, Corabelle M. Rogers, entered into a written partnership agreement, effective January 1, 1941, for the purpose of conducting a business, under the name of Twin Oaks Builders Supply Co., of general supply in the city of Eugene, Oregon. Each of the parties contributed \$2,000 to the partnership capital and also obligated themselves on a promissory note of the partnership payable to Twin Oaks Company, a corporation, in the amount of \$89,378.25, in payment for certain assets which were thereafter used by the partnership in its business. By the terms of the said partnership agreement, as amended, the profits of the said business were to be divided equally among the said parties after payment to me and John J. Rogers of the sum of \$9,000 per year each, and the payment to Corabelle M. Rogers and Eva M. Scharpf of the sum of \$300 per year each. The losses of the said business were to be divided equally among the partners.

In entering into said partnership the partners had a bona fide intent to be partners in the conduct of said business and to share in the profits and losses thereof.

The said partnership was bona fide in all respects

and was entitled to recognition for Federal income tax purposes.

This claim is for the amount of deficiency that was asserted against me upon determination by the Bureau of Internal Revenue that the distributive income of Eva M. Scharpf from the said partnership was taxable to me, less overassessment determined to be due on such ground to Eva M. Scharpf.

Under date of October 15, 1954, appellants as executors of taxpayer's estate received from the District Director of Internal Revenue in Portland, Oregon, "Notice of Adjustment" of taxpayer's income tax liability for the year 1944, in which it was determined that there was an overassessment or overpayment of taxpayer's income tax for that year in the amount of \$4,006.20, plus interest in the amount of \$711.73. The District Director allowed a refund to appellants of only \$122.55, being the amount of the income tax and interest paid by taxpayer for the year 1944, within two years prior to the filing of the claim for refund dated February 16, 1951. The sum of \$122.55, plus interest of \$40.25, was refunded to appellants about October 18, 1954. This action was based upon the Commissioner's determination (1) that the refund claim filed March 13, 1948, although timely, did not apprise the Commissioner of the exact basis therefor, and (2) the refund claim filed on February 16, 1951, although apprising the Commissioner of the exact basis therefor, was not timely and could not be considered as an amendment of the first refund claim. Appellants received statutory notices of disallowance of both the original and the amended refund claims on October 19, 1954. (R. 1920.)

The District Court sustained the Commissioner's disallowance of both claims. It held that the claim filed on March 13, 1948, did not set forth the ground upon which this suit is based; and that the second claim filed on February 16, 1951, was not a timely and proper claim nor was it a permissible amendment to the original claim. In addition, the District Court held that the Commissioner did not waive the requirements of the Regulations. (R. 20-21, 52-54.)

SUMMARY OF ARGUMENT

Section 3772(a)(1), Internal Revenue Code of 1939, provides that no suit for refund shall be maintained unless a claim for refund or credit has been filed with the Commissioner in accordance with the law and the Regulations in that regard. Section 322(b)(1) provides that no refund or credit be allowed unless a claim for refund or credit is filed within three years from filing the return or two years from the time the tax was paid, whichever is later. The implementing Regulations set forth the manner of filing a claim and provide that each claim must detail each ground and sufficient facts to apprise the Commissioner of the exact basis of the claim. The Regulations also provide that no refund or credit will be allowed after the expiration of the statutory period for filing a claim except upon one or more of the grounds set forth in a claim filed prior to the expiration of that period. Thus, no recovery can be had in any suit except upon the grounds stated in a prior claim for refund or credit.

In the instant suit, the original refund claim of March 13, 1948, did not present the ground upon which this suit is based. That claim stated a single specific ground for recovery, namely, that in a proceeding then pending in the Tax Court, the Commissioner had asserted that taxpayer's income derived from the partnership was taxable to the corporation—not to taxpayer. That claim, therefore, restricted recovery to the tax consequences flowing from the culmination of the proceeding in the Tax Court involving the corporation.

The ground upon which this suit is based was stated in the second claim filed on February 16, 1951. The second claim, however, was untimely because it was not filed within three years after the return was filed, which expired on March 15, 1948; nor was it filed within two years after the tax was paid, which expired on March 8, 1950. A claim stating a specific ground may not be amended, after the period of limitation for filing a claim, to seek a refund on an unrelated ground. The original claim here stated the specific ground involving the Commissioner's disregard of the partnership form. The second claim stated the specific ground involving the Commissioner's recognition of the partnership but disallowance of taxpayer's wife as a bona fide partner. The ground of the second claim is unrelated to that of the first claim. Accordingly, since the second claim was untimely and stated an unrelated ground, the second claim was not a permissible amendment of the original claim. In effect it constituted a new claim, in the guise of an amendment to the prior claim.

Taxpayer's contention that the letter of March 6, 1948, should be viewed as the refund claim on which this suit is based is without merit; the letter did not purport to be a refund claim, it was not based on any particular ground as required by the Regulations, and in any event it was superseded by the formal and specific (original) claim of March 13, 1948. Taxpayer's alternative contention that the Commissioner waived the requirement of the Regulations as to the form of the claim is beside the issue; the original and the subsequent claims each set forth specific (but different) grounds, and were otherwise satisfactory as to form, but the later claim was untimely and the Commissioner is powerless to waive the statutory period of limitations. Accordingly, the District Court correctly held that the second claim for refund was not timely under Sections 322(b)(1) and 3772(a)(1), Internal Revenue Code of 1939, and was not a permissible amendment to the original claim which did not set forth the ground upon which this suit is based.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT THE SECOND CLAIM FOR REFUND FILED ON FEBRUARY 16, 1951, WAS NOT TIMELY UNDER SECTIONS 322(b) AND 3772(a), INTERNAL REVENUE CODE OF 1939, AND WAS NOT A PERMISSIBLE AMENDMENT TO THE ORIGINAL CLAIM FILED ON MARCH 13, 1948, WHICH DID NOT SET FORTH THE GROUND UPON WHICH THIS SUIT IS BASED.

A. The refund claim of March 13, 1948, did not present the ground upon which this suit is based.

Section 3772(a)(1) of the Internal Revenue Code of 1939 (Appendix, *infra*) provides that no suit for refund

shall be maintained unless a claim for refund or credit has been filed with the Commissioner "according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof". Section 322(b)(1) (Appendix, *infra*) provides that no refund or credit be allowed unless a claim for refund or credit is filed within three years from filing the return or two years from the time the tax was paid, whichever is later.¹ The implementing Regulations set forth the manner of filing a claim and provide (Treasury Regulations 111, Section 29.322-3 (Appendix, *infra*)):

No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed prior to the expiration of such period. The claim must set forth in detail and under oath each ground upon which a refund is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. * * *

The purposes of the claim requirements prior to a refund suit are to insure the orderly administration of the revenue and afford the Commissioner an opportunity to correct errors made by his office without the necessity of litigation. *United States v. Felt & Tarrant Co.*, 283 U.S. 269, 272; *Nichols v. United States*, 7 Wall. 122, 129-131. Obviously, unless all the grounds relied upon by a taxpayer are presented to the Commissioner, the desired

¹ The applicable statutory provisions are Sections 322(b) of the Internal Revenue Code of 1939 and 7422(a) of the Internal Revenue Code of 1954. The latter section is substantially the same as Section 3772(a)(1) of the 1939 Code, and for convenience we refer (as did the District Court) to the provisions of the 1939 Code.

It is settled that a claim may be amended prior to the expiration of the period of limitations, which in this case is two years after the tax was paid. Section 322 (b)(1); *Pacific Mills v. Nichols*, 72 F. 2d 103 (C.A. 1st); *First Nat. Pictures v. United States*, 32 F. Supp. 138 (C. Cls.); Treasury Regulations 111, Section 29.322-3. This settled principle is not applicable here, however, because the deficiency was paid on March 8, 1948, but the second claim was not filed until February 16, 1951. (R. 16, 18.)

The Supreme Court has stated that a claim limited to a specific ground may not be amended after the period of limitations to seek a refund on an unrelated ground. *United States v. Garbutt Oil Co.*, 302 U.S. 528; *United States v. Andrews*, 302 U.S. 517; *United States v. Henry Prentiss & Co.*, 288 U.S. 73. In the *Andrews* case, taxpayer's original claim set forth a loss due to the worthlessness of stock. The purported amendment filed after the period of limitations alleged as ground for refund that an amount reported as dividend income was not taxable as such but was capital gain resulting from a sale. The Supreme Court disallowed the amendment and stated (p. 524):

Where a claim which the Commissioner could have rejected as too general, and as omitting to specify the matters needing investigation, has not misled him but has been the basis of an investigation which disclosed facts necessary to his action in making a refund, an amendment which merely makes more definite the matters already within his knowledge, or which, in the course of his investigation, he would naturally have ascertained, is permissible. *On the other hand, a claim which demands relief upon one*

asserted fact situation, and asks an investigation of the elements appropriate to the requested relief, cannot be amended to discard that basis and invoke action requiring examination of other matters not germane to the first claim. [Italics supplied.]

Similarly, in the *Henry Prentiss & Co.* case, taxpayer's original claim set forth its need for a special assessment due to extraordinary conditions in its business. The purported amendment, filed after the expiration of the period of limitations, set forth as a ground for relief the alleged undervaluation of real estate and the exclusion of certain intangibles in computing its invested capital. The Supreme Court disallowed the amendment, stating (p. 85):

A demand for a special assessment in accordance with § 327(d) of the statute of 1918 is not a challenge to any act of the Commissioner in the valuation of invested capital. * * * It has no relation, for example, to an assessment of tangible property, such as land or buildings, at less than the cash value.

In both the *Andrews* and *Prentiss* cases, the original claim stated a specific ground as the basis for refund. Here, as demonstrated under subheading A, the original claim stated a specific ground as the basis for a refund, namely, that the Commissioner had asserted that the taxpayer's income derived from the partnership was taxable to the corporation—not to taxpayer. (R. 16, 17.) This ground involved the issue of a corporation vis-a-vis a partnership. The ground set forth in the second claim was that a valid partnership existed between taxpayer and his wife and that the Commissioner erroneously refused to recognize the wife as a partner. (R. 18-19.)

Thus, the original claim was grounded upon disregard of the partnership, while the second claim was grounded upon recognition of the partnership. The two claims, and the grounds upon which they are predicated, are quite different and indeed mutually inconsistent. Here, as in *United States v. Garbutt Oil Co.*, *supra*, "the ground asserted in the later demand was totally inconsistent with and involved a negation of that specified in the [original] claim for refund". In the words of the court below (R. 53-54):

This is not a case where an informal or general claim for refund was later amended by a specific claim. This is a case in which, after the statute of limitations had run, an attempt was made to file a new claim under the guise of an amendment to a prior claim, which, although timely filed, never materialized. Under these circumstances, the new claim is barred by the two-year statute of limitations. *United States v. Andrews, Executrix* (1938), 302 U.S. 517; *United States v. Garbutt Oil Co.* (1938), 302 U.S. 528.

There was no action on the part of the Commissioner of Internal Revenue which constituted a waiver, since the Commissioner is powerless to waive the substantive requirements of the statute requiring that the claim be presented within a given period of time. *United States v. Garbutt Oil Co.*, *supra*. The function of the statute, like that of limitations generally, is to give protection against stale demands. *United States v. Memphis Cotton Oil Co.* (1933), 288 U.S. 62, 71.

When the Commissioner included one half of the partnership profits in the taxpayer's income, he notified taxpayer that taxpayer's wife was not recognized as a partner. (R. 15-16.) Nevertheless, when taxpayer filed

the original claim for refund, he did not assert the ground on which the deficiency was based, namely, that the wife was not a bona fide partner. Instead, taxpayer claimed a refund only in the event the Commissioner successfully caused all of the partnership profits to be taxable to the corporation. (R. 17-18.) The Commissioner had a right to assume that taxpayer had abandoned the ground upon which the deficiency was based. In any event, contrary to taxpayer's argument (Br. 14-16), the Commissioner had a right to insist that the grounds for the claimed refund be stated in the claim (Treasury Regulations 111, Section 29.322-3), as the following statement of the Supreme Court demonstrates (*Angelus Milling Co. v. Commissioner*, 325 U.S. 293, 296, 297, 299):

The effective administration of these modern complicated revenue measures inescapably leads Congress to authorize detailed administrative regulations by the Commissioner of Internal Revenue. He may insist upon full compliance with his regulations. * * *

* * * * *

Treasury Regulations are calculated to avoid dilatory, careless and wasteful fiscal administration by barring incomplete or confusing claims. * * *

The showing should be unmistakable that the Commissioner has in fact seen fit to dispense with his formal requirements and to examine the merits of the claim. It is not enough that in some roundabout way the facts supporting the claim may have reached him. The Commissioner's attention should have been focused on the merits of the particular dispute. The evidence should be clear that the Commissioner understood the specific claim that was made even though there was a departure from form

in its submission. We do not think that the petitioner has made out such a case here.

* * * * *

An additional argument of the petitioner need not detain us long. It urges that taking the claims filed by Niagara and petitioner together, they furnish all the data required by the regulations. *But it is not enough that somewhere under the Commissioner's roof is the information which might enable him to pass on a claim for refund. The protection of the revenue authorizes the Commissioner to demand information in a particular form, and he is entitled to insist that the form be observed so as to advise him expeditiously and accurately of the true nature of the claim.* [Italics supplied.]

Obviously, the Commissioner knew the ground upon which the deficiency against taxpayer was based. Taxpayer refers to documents which were exhibits in the Tax Court in the *Twin Oaks Co. v. Commissioner* proceeding. (Br. 16-18.) Taxpayer's letters dated September 25, 1946, and March 6, 1948 (R. 24-27), antedated the original refund claim which did not state, as a ground for refund, the Commissioner's refusal to recognize taxpayer's wife as a bona fide partner. Instead, the original claim stated as the specific ground for refund the Commissioner's inclusion of the partnership profits in the corporation's income. (R. 17-18.)³ The wife's claim (R.

³ Taxpayer apparently argues that the letter of March 6, 1948, transmitting the deficiency payment and informing the Commissioner generally of his dissent should be considered an informal and general claim for refund. (Br. 10.) As taxpayer seems to concede, however, the original and formal claim for refund of March 13, 1948, superseded the general letter of March 6, 1948, and the formal claim was not vague and general. (Br. 10.)

27-29) does no more than reiterate the basis of the deficiency against taxpayer as do the opening statements (R. 31-36). The Regulations require that *taxpayer's claim* apprise the Commissioner of the exact basis. Treasury Regulations 111, Section 29.322-3. There is nothing in these references which even purports to bring the Commissioner's attention to the fact that taxpayer asserted, as a ground for refund, the Commissioner's refusal to recognize taxpayer's wife as a bona fide partner. The Commissioner had no indication of this latter assertion until the second refund claim of February 16, 1951. Clearly, the Supreme Court's statements quoted above from the *Angelus Milling Co.* case dispose of taxpayer's contention. (Br. 16-18.) See also *United States v. Garbutt Oil Co.*, *supra*.

That a taxpayer mistakenly omits a ground from his refund claim is of no significance even if later it turns out that such ground would have entitled him to a refund. The circumstances here point strongly to such a mistaken omission, however, as the Third Circuit has remarked in the analogous case of *Mesta v. United States*, 137 F. 2d 426, 427, 428:

There is no dispute of fact between the plaintiff and the defendant, the correctness of the amount of the claim is admitted; the sole defense for the Commissioner's refusal to make the refund is the statute of limitations. If the Commissioner is right on his point of law, he is not permitted to waive the requirements however churlish the refusal may seem in view of the now admitted correctness of the taxpayer's refund claim. * * *

* * * * *

The Court, itself composed of taxpayers, feels sympathy with this plaintiff's position. * * *

But the most sympathetic consideration for the taxpayer cannot bring us to the interpretation of the language in her original claim which her resourceful counsel now urges. * * *

Furthermore, the ground stated in the original claim did not require the Commissioner to make a general re-audit of taxpayer's liability. The Commissioner's investigation of the ground stated in the claim had been made prior to the filing of the original claim and resulted in his determination that the partnership profits constituted taxable income to the corporation. Even if a re-audit was made, as apparently there was since an overassessment was determined and adjustment made (R. 19-20), the Commissioner was not required to accept the untimely amendment and permit circumvention of the statute and Regulations. *United States v. Garbutt Oil Co., supra*; *Angelus Milling Co. v. Commissioner, supra*; see *Socony-Vacuum Oil Co. v. United States*, 146 F. 2d 853 (C.A. 2d).⁴

⁴ Taxpayer suggests (Br. 12) that the amount of his original refund claim (\$7134.44) supports an inference that it was grounded upon the family partnership issue, i.e., the Commissioner's non-recognition of his wife as a partner. On the contrary, had the claim been predicated on that ground the amount refundable would have been \$8,328.06 (plus interest), the *deficiency* assessed by reason of the Commissioner's non-recognition of the wife as a partner (R 15-16) rather than the \$7,134.44 tax originally paid on the assumption his wife was a bona fide partner. In any event, even if the amount originally claimed coincided with the amount subsequently claimed, that would furnish no basis for treating the later claim as a timely amendment. See *United States v. Garbutt Oil Co., supra*.

C. The Commissioner did not waive the requirements of the Regulations.

Taxpayer alternatively asserts that the Commissioner waived his Regulations as to the form and content of the claim. (Br. 21-23.) No attempt is made, however, to demonstrate how a waiver occurred. (See Br. 23.) Though the Commissioner may waive the formal requirements of the Regulations (which were here met), he cannot waive the mandate of the statute requiring a timely claim prior to refund or credit. Section 322(b); *United States v. Garbutt Oil Co.*, 302 U.S. 528; *Rogan v. Taylor*, 136 F. 2d 598 (C.A. 9th).

Taxpayer here filed an original and timely claim for refund on a particular ground, in the form required by the Regulations. He is simply attempting, after the statute of limitations has run, to shift the basis for his claim and assert a new claim in the guise of an amendment of the earlier one. It is settled that the Commissioner is powerless in such a case to accept and act upon the amended claim. *United States v. Garbutt Oil Co.*, *supra*; *United States v. Andrews*, *supra*; *United States v. Prentiss & Co.*, *supra*. The court below properly observed (R. 53-54) that "There was no action on the part of the Commissioner of Internal Revenue which constituted a waiver, since the Commissioner is powerless to waive the substantive requirements of the statute requiring that the claim be presented within a given period of time * * *. The function of the statute, like that of limitations generally, is to give protection against stale demands".

CONCLUSION

No suit for recovery of taxes paid can be maintained unless a claim for refund or credit has been filed setting forth the grounds for recovery. No recovery can be had except upon the grounds alleged in the prior claim. The refund claim of March 13, 1948, stated a specific ground and did not present the ground upon which this action is based. The purported amendment of February 16, 1951, setting forth the ground upon which this suit is based was untimely and therefore was not a permissible amendment of the original claim. Accordingly the District Court correctly held that the action of the Commissioner in disallowing the claim for refund was proper, and its judgment should be affirmed.

Respectfully submitted,

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OCTOBER, 1957.

APPENDIX

Internal Revenue Code of 1939:

SEC. 322. REFUNDS AND CREDITS.

* * * * *

(b) *Limitation on Allowance.*—

(1) *Period of limitation.*—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

* * * * *

(26 U.S.C. 1952 ed., Sec. 322.)

SEC. 3772. SUITS FOR REFUND.

(a) *Limitations.*—

(1) *Claim.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

(2) *Time.*—No such suit or proceeding shall be begun before the expiration of six months from the date of filing of such claim unless the

Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates.

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(26 U.S.C. 1952 ed., Sec. 3772.)

Internal Revenue Code of 1954:

SEC. 7422. CIVIL ACTIONS FOR REFUND.

(a) *No Suit Prior to Filing Claim for Refund.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

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(26 U.S.C. 1952 ed., Supp. II, Sec. 7422.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

Sec. 29.322-3 [As amended by T.D. 5325, 1944 Cum. Bull. 152] *Claims for Refunds by Taxpayers.*—Claims by the taxpayer for the refunding of taxes, interest, penalties, and additions to tax erroneously or illegally collected shall be made on Form 843, or on Form 1040 or Form 1040A, or by the use of Form W-2 (Rev.), as provided in this section, and should be filed with the collector of internal revenue. A separate claim shall be made for each taxable year or period.

No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed prior to the expiration of such period. The claim must set forth in detail and under oath each ground upon which a refund is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. * * *

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The Commissioner has no authority to refund on equitable grounds penalties or other amounts legally collected. * * *

Sec. 29.322-7. *Limitations Upon the Crediting and Refunding of Taxes Paid.*—(a) *General rule.*—Unless a claim for credit or refund of an overpayment is filed within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, the Commissioner is prohibited from allowing or making a credit or refund of income tax imposed by chapter 1 for such year after both periods have expired. If no return is filed by the taxpayer, the Commissioner is prohibited from allowing or making a credit or refund of such tax after two years from the time the tax was paid unless before the expiration of such 2-year period a claim therefor is filed. * * *

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